2000

State of Utah v. John Johnson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20000372-CA
vs.	:	
JOHN JOHNSON,	:	
Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOLLOWING A BENCH TRIAL OF POSSESSION OF A CONTROLLED SUBSTANCE WITH A PRIOR CONVICTION, A CLASS A MISDEMEANOR, AND POSSESSION OR USE OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANNOTATED, SECTION 57-37-8(2)(a)(i) AND 58-37A-5(1). THIS COURT HAS JURISDICTION OVER THIS APPEAL PURSUANT TO UTAH CODE ANNOTATED, SECTION 78-2a-3(e). IN THE SEVENTH JUDICIAL DISTRICT COURT, IN AND FOR SAN JUAN COUNTY, STATE OF UTAH, THE HONORABLE LYLE R. ANDERSON PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction following a bench trial for Possession of a Controlled Substance with a Prior conviction, A Class A misdemeanor, and Possession or Use of Drug Paraphernalia, A Class B Misdemeanor, in violation of Utah Code Annotated, Section 57-37-8(2)(a)(i) and 58-37a-5(1) in the Seventh District Court in and for San Juan County, State of Utah, the Honorable Lyle R. Anderson, presiding. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated, Section 78-2a-3(e).

STATEMENT OF ISSUES ON APPEAL AND STANDARD OF APPELLATE REVIEW

1. Are the record evidence and the reasonable inferences therefrom sufficient to establish that Defendant constructively possessed marijuana and paraphernalia.

"When reviewing a bench trial for sufficiency of evidence

[appellate courts] must sustain the trial court's judgment unless it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." State vs. Reed, 839 P2d. 878, 879 (Ut. App. 1992) (citation omitted). This Court must resolve all disputes in a light most favorable to the trial court's determination. Utah Dept. of Soc. Serv. vs. Adams, 806 P.2d 1193, 1197 (Utah App. 1991). This is a "highly deferential" standard of review because the lower court is in the "best position to assess the credibility of witnesses and derive a sense of the proceedings as a whole." State vs. Pena, 869 P.2d 932, 936 (Utah 1994).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The determinative statutes and rules are set out in the body of the brief.

STATEMENT OF THE CASE

Defendant, John Johnson, age 21 years, was charged with Possession of a Controlled Substance, Marijuana, charged as a Class A misdemeanor because of a prior offense, and Possession of Drug Paraphernalia, (Exhibit A). At the April 6th of 2000 bench trial, the District Court found all charges against the Defendant to be true beyond a reasonable doubt. Immediately thereafter the Defendant was sentenced to one year in the San Juan County Jail on the marijuana charge and six months on the paraphernalia charge to be served concurrently, and fined a total fine and

assessments of $925.00. The Court stayed the jail sentence and placed the defendant on probation for a term of twenty-four months and suspended all but 120 days in jail. Defendant timely filed a Notice of Appeal.

STATEMENT OF FACTS

Defendants was pulled over while traveling through San Juan County, Utah, on the 8th day of December, 1999 for speeding, 82 in a 65 mile per hour zone (Transcript 6, hereafter T). There were three occupants in the vehicle. Defendant in this case was a passenger in the vehicle, his brother was the driver. The owner of the vehicle (Bollenbaugh) was in the back seat (T7). Edward Johnson, the driver, is the brother of John Johnson, the Defendant (T7). Upon approaching the vehicle from the drivers side, Trooper Randall could immediately smell a strong odor of burnt marijuana coming from the vehicle (T7). Trooper Randall had the individuals step out of the vehicle, he gave all of them their Miranda warnings, before patting down Edward Johnson, he asked him whether he had any controlled substances. Edward Johnson stated, "he had some in his pocket." (T7) Defendant, John Johnson was questioned about the use of marijuana and the pipe, he stated that "he used the substances earlier in the day"(T8). When he was asked again by the officer whether he had used the substances in Blanding, he said that "he didn't use them in Blanding, he had used them earlier in the day but not in Blanding "(T8). John Johnson further stated that he had smoked

the marijuana from the pipe. The trooper stated that he had the pipe and that Mr. John Johnson stated that he had smoked the substance from that pipe(T9). The trooper stated that he had confiscated the pipe and the marijuana placed them on the front seat of the car. They were talking about the substances, the Officer asked John Johnson whether he had used them and he said "yes," the Officer said "the one that your brother has", and he said "yes" (T11). The trooper asked John, the defendant, whether he had used the pipe of his brothers and he said "yes"(T12). The trooper testified the Defendant had made statement about the use of the drugs and paraphernalia both at the side of the road and at the jail (T15). The trooper indicated that the "individuals" had talked about the Taco Bell in Blanding (T14). They had not indicated to the trooper that they had been to a McDonald's in Kayenta. Trooper indicated that some town in Arizona came up but he wasn't sure whether it was Kayenta (T15). The Defendant, Mr. Johnson, had been arrested by this Trooper for a drug violation approximately a year prior to this occasion. The Officer asked, without recognizing the individual, if he'd ever been arrested before and he stated "that he had not" (T18).

The Defendant directly contested the version of the Officer about the statements defendant made on the side of the road and in the jail. Defendant stated that "he did not make any statements stating that he had smoked or used any of the materials Ed Johnson had on him", and further stated "that he did

not say that he had smoked marijuana earlier that day, or that he had used the pipe earlier that day" (T55).

The Court found that where there was a conflict in the testimony that he did not believe either Charley Bollenbaugh or the Defendant. The Court found that the testimony between the two of them wasn't consistent. The Judge further found that it was not even fifty percent consistent (T76-77). He was not sure they were even talking about the same event. The Court found that he could not see any motive for the Officer to fabricate his testimony about John Johnson because they already had Ed Johnson dead to rights and if he would fabricate the testimony about John Johnson, he would have fabricated the testimony about Charley Bollenbaugh. The Court found that the Officer let Charley Bollenbaugh off because he never implicated himself. The Court believed the Officer when he said that John Johnson did implicate himself on the side of the road and at the jail. The Court found that the Defendant, John Johnson, smoked with his brother on this trip and thereby the stuff in his brother's pocket was known by the defendant and was constructively possessed by him (T76-77).

SUMMARY OF ARGUMENT

Because defendant fails to properly marshal the evidence and establish the reasonable inferences therefrom in support of the Court's findings, this Court need not address his claim of insufficient evidence.

ARGUMENT

Defendant has failed to marshal the record evidence and findings and the reasonable inferences therefrom in favor of the State and then demonstrate how the findings were insufficient to support the verdict. Defendant is required to take the position of the prosecution and point out all inferences in favor of the verdict and then show why the verdict cannot be sustained, having failed to do this the Court should decline to consider Defendant's claim.

"In challenging the sufficiency of the evidence, defendant carries a heavy burden." State vs. Pilling, 875 P.2d 604, 607, (Utah App 1994). This Court will only reverse for insufficient evidence when the evidence is "sufficiently inclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he or she was convicted." State vs. Gibson, 908 P.2d 352, 355, (Utah App. 1995) (citations omitted), cert. denied, 917 P.2d 556 (Utah 1996). This Court will review all evidence and reasonable inferences therefrom in a light most favorable to the decision of the lower court. State vs. Layman, 953 P.2d 782, 786 (Utah App. 1998.)

To establish a claim of insufficiency of the evidence, defendant "must marshal all evidence in support of findings and demonstrate that the evidence, including all reasonable inferences drawn therefrom is insufficient to support the findings." York vs. Shulsen, 875 P.2d 590, 598 (Utah App.)

(citations omitted), cert. denied, 883 P.2d 1359 (Utah 1994). "The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position." West Valley City vs. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991). Defendant must then present, "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the applicant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence." Id. at 1311. Although defendant acknowledges his burden in marshaling the evidence, he fails to satisfy this requirement. Id. at 1315.

Purporting to marshal the evidence, defendant lists five factors which he believes he gleaned from the trial but has not set forth all of the factors which the Court may have used. Additionally, defendant does not complete the process of marshaling the facts to assemble every bite of competent evidence which supports the findings of the trail court and the appropriate inferences therefrom and then point out the fatal flaw in the evidence.

Defendant has simply stated, in his brief, five points which he indicates are the evidence in this case and then argues that these facts are legally insufficient to support the trial courts conclusions. The defendant has shown no flaw, they have shown no reason why those points would not be sufficient, they

argue they are not sufficient.

Contrary to defendant's assertions, however, the record evidence and reasonable inferences therefrom plainly indicate that the defendant could be found guilty of constructive possession.

The most significant of which is the Courts determination in its finding that it believed the officer when he said that "John Johnson did implicate himself, both on the side of the road and at the jail." The Court viewing all of the testimony of all of the witness chose to discount and not believe the evidence of Mr. Bollenbaugh and Mr. Johnson. This one finding is legally sufficient for the Court to base its decision that Mr. Johnson constructively possessed the marijuana and paraphernalia.

When adding the additional evidence which the Court had before it, that the two individuals stories were inconsistent, defendant had lied to the officer about having any prior problems with the law, and did not find any motive on the officer's part to fabricate. The Officer had the strong odor of marijuana coming from the car which presumably was unmistakable, but the defendant failed to recognize it. Defendant was in the car and in close proximity to the drugs. The Defendant had indicated to the officer that he had used the substance prior in that day.

The foregoing evidence, including the reasonable inferences therefrom, all of which defendant has failed to marshal, clearly establish that the Court could find that the defendant possessed marijuana and paraphernalia. Defendant has taken the position

that his mere presence in the car was insufficient to establish his involvement with the marijuana. As defendant "persistently argues [his] own position without regard for the evidence supporting the [lower courts] findings," Horton vs. Gem State Mutual of Utah, 794 P.2d 847, 849 (Utah App. 1990) (citations omitted) he has waived the right to have his insufficiency claim considered on appeal. State vs. Mincy, 838 P.2d, 648, 652 (Utah App.), cert denied. 843 P.2d 1042 (Utah 1992).

CONCLUSION

Defendant's appeal should be denied.

Respectfully submitted this 2nd day of November, 2000.

Craig C. Halls
Attorney for Appellee

CERTIFICATE OF MAILING

I hereby certify that two true anc accurate copies of the foregoing Brief of Appellee was mailed William L. Schultz, attorney for defendant, at P.O. Box 937, Moab, Utah 84532 this 2 day of November, 2000, by placing same postage prepaid in the Monticello Post Office.

Julie Wood

ADDENDA

ADDENDA

EXHIBIT A

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IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. JOHN JOHNSON, DOB: 08/18/1979, 4142 N. 45TH PLACE #7 PHOENIX, AZ 85018 Defendant.	AMENDED **INFORMATION** Case No. 0017- 8 Judge Lyle R. Anderson OTN: 9656182

This information is based on evidence obtained from the following witness: SANFORD RANDALL

The undersigned Craig Halls, under oath states on information and belief that the defendant, in San Juan County, State of Utah, committed the crime(s) of:

COUNT 1: POSSESSION OR USE OF A CONTROLLED SUBSTANCE, WITH A PRIOR CONVICTION in violation of §58-37-8(2)(a)(i), a class A misdemeanor, as follows: That on or about 12-28-1999, the defendant having been previously convicted of Unlawful Possession or Use of a Controlled Substance, did knowingly and intentionally possess or use marijuana.

COUNT 2: POSSESSION OF DRUG PARAPHERNALIA in violation of §58-37a-5(1), a class B misdemeanor, as follows: That on or about 12-28-1999, the defendant did knowingly, intentionally or recklessly use, or possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, re-pack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.

Authorized February 8, 2000,
for presentment and filing:

By _____
Craig C. Halls
San Juan County Attorney

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